FILED

JUN 14 1951

CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO. 117

The Board of Commissioners for the Atchafalaya Basin Levee District, Petitioner

Versus

Mrs. Mary A. Smyth, Widow of Frank G. Nelson, John M. Smyth, and the Louisiana Land and Exploration Company, Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

JOHN L. MADDEN
State Capitol
Baton Rouge, Louisiana
Counsel for Petitioner

Of Counsel:

FERD C. CLAIBORNE
New Roads, Louisiana

CHARLES H. DAMERON
314 Louisiana National Bank Building
Baton Rouge, Louisiana

ASHTON L. STEWART
312 Louisiana National Bank Building
Baton Rouge, Louisiana

Franklin Press, Inc. Baton Rouge, La.

INDEX

PAGE

Petition for Writ of Certiorari 1-7

1. Summary Statement of the Matters Involved 2
2. Jurisdictional Statement 3
3. Questions Presented 4
4. Reasons Relied Upon for Allowance of Writ 5
5. Conclusion 6

LIST OF AUTHORITIES

CASES

PAGE

Hormel v. Helvering, 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037 5

State v. Winehill & Rosenthal, 147 La. 781, 86 So. 181 5

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528 5

Guaranty Trust Co. of New York v. York, 65 S. Ct. 1464, 326 U.S. 99, 89 L. Ed. 2079 6

CONSTITUTION, STATUTES AND TEXTS

Louisiana Code of Practice (Revised 1870), Article 346 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

NO.

The Board of Commissioners for the Atchafalaya Basin Levee District, Petitioner

Versus

Mrs. Mary A. Smyth, Widow of Frank G. Nelson, John M. Smyth, and the Louisiana Land and Exploration Company, Respondents

---

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Board of Commissioners for the Atchafalaya Basin Levee District, for review by this Court on writ of certiorari of a judgment and decree of the United States Court of Appeals for the Fifth Circuit rendered February 7, 1951 (R. 532), (see *Board of Commissioners for Atachafalaya Basin Levee District, et al. v. Smyth, et al.*, Fifth Circuit, 187 F. 2d 11), wherein rehearing was denied April 19, 1951 (R. 539), with respect, represents:

1.

Summary and Short Statement of the Matter Involved

Mrs. Mary A. Smyth, widow of Nelson, et al. filed this suit against petitioner and others to be recognized as owners of approximately 8000 acres of land in Louisiana. The sole basis of jurisdiction is diversity of citizenship. The suit is premised on the claim of Mrs. Smyth, et al., that they are the successors, assignees, transferees, etc. of certain parties with whom petitioner contracted to sell such land.

Petitioner first filed a motion to dismiss on the basis that the complaint failed to state a claim against it upon which relief could be granted (R. 252). After such motion was denied (R. 254), petitioner filed an answer in which it not only put at issue the cause of action asserted by Mrs. Smyth, et al., but also put at issue the right to such action in Mrs. Smyth, et al. (R. 255). Mrs. Smyth, et al., then filed a motion for summary judgment (R. 478) and petitioner filed a cross-motion for summary judgment (R. 481). Judgment was then rendered for summary judgment in favor of Mrs. Smyth, et al., as prayed for (R. 503).

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit and there reurged the only question that had been presented to the district court by the pleadings—that is, the interpretation of the many contracts sued on by Mrs. Smyth, et al. Such question is purely and simply a question of law, and involves, first, whether there was a cause of action in Mrs. Smyth, et al., that is, whether the contracts included the 8000 acres, and second, whether there was a right

of action in Mrs. Smyth, et al., that is, whether the contracts transferred the claimed 8000 acres to Mrs. Smyth, et al.

The argument in the district court on such question, which was raised by the pleadings, and which was solely a legal question, was as to the cause of action asserted by Mrs. Smyth, et al., that is, whether the contracts included the 8000 acres. No argument was presented to the district court as to the right of action asserted by Mrs. Smyth, et al., that is, whether the contracts transferred the claimed 8000 acres to Mrs. Smyth, et al., despite the fact that the motion to dismiss, the answer, and the cross-motion for summary judgment all raised and put at issue such right of action claimed by Mrs. Smyth, et al.

The United States Court of Appeals for the Fifth Circuit, on such appeal by plaintiff, by a per curiam opinion, refused to consider the above question, even though it was raised by the pleadings, as to the right of action of Mrs. Smyth, et al., to claim these 8000 acres.

The jurisprudence of Louisiana is clear that in such a case in the courts of such state that such question, raised by the pleadings, as to the right of action of Mrs. Smyth, et al., would have been considered in the appellate court.

2.

Jurisdictional Statement

1. The United States Court of Appeals for the Fifth Circuit has decided that it will not review a question which was raised by motion to dismiss, answer and motion for summary judgment, though it is only a legal question, because it was not argued or passed on in the trial court even though the obvious result of failure to consider such question will result in a plain

miscarriage of justice; such decision being contrary to applicable decisions of this Court.

2. The United States Court of Appeals for the Fifth Circuit has decided that it will not review, in a diversity of citizenship case in Louisiana, the question of the right of action of the claimants, though it is only a legal question which was raised by motion to dismiss, answer and motion for summary judgment, because it was not argued or passed on in the trial court, despite the fact that the law of Louisiana is well settled that such right of action of claimants may be raised for the first time in an appellate court, thus deciding an important question of local law in conflict with applicable local decisions.

The above grounds are substantial because it is clear that the obvious result of failure to consider the question of the right of action of Mrs. Smyth, et al., to the 8000 acres will result in a plain miscarriage of justice.

3.

Question Presented

The only question presented is whether the United States Court of Appeals, in a diversity of citizenship case in Louisiana, can refuse to consider the question of right of action of the claimants, though it is only a legal question which was raised by motion to dismiss, answer and motion for summary judgment, because it was not argued or passed on in the trial court, despite (a) the obvious result of failure to consider such question will result in a plain miscarriage of justice, and (b) that the law of Louisiana is well settled that such right of action of claimants may be raised for the first time in an appellate court.

4.

Reasons Relied Upon for Allowance of Writ

Even though a federal appellate court does not ordinarily give consideration to issues not raised below because their procedural scheme contemplates that the parties shall come to issue in the trial court which is vested with authority to determine facts, nevertheless, when questions of law were raised by the pleadings, but were neither pressed nor passed upon by the trial court, an appellate court should pass on them, where, otherwise, the obvious result would be a plain miscarriage of justice. Such is the present case, for if the question of law as to the right of Mrs. Smyth, et al., to the title of the 8000 acres is passed upon, it is clear that their suit will be dismissed, as they have no right to such 8000 acres. *Hormel v. Helvering*, 61 S. Ct. 719, 312 U.S. 552, 85 L. Ed. 1037.

It is clear that under Louisiana law (*State v. Winehill & Rosenthal*, 147 La. 781, 86 So. 181), that " 'a total want of legal right in a suitor, in relation to the matters in litigation, ought to be taken into consideration and acted on by the courts of justice, at any stage of a cause.' " Peremptory exceptions, such as no right of action, when founded on law may be pleaded in every stage of the action even in the appellate court. Louisiana Code of Practice (Revised 1870), Article 346.

And under "*Erie R. Co. v. Thompkins* and its progeny . . . in diversity cases the federal court administers the state system of law in all except details related to its own conduct of business." An even if it were agreed that the Louisiana statute is procedural, "it would not determine that it is not applicable." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 1528.

In essence, the intent of the decision of this Court in *Erie Railroad Co. v. Tompkins* was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of the litigation, as it would if tried in a state court. *Guaranty Trust Co. of New York v. York*, 65 S. Ct. 1464, 326 U.S. 99, 89 L. Ed. 2079.

Conclusion

Applicant alleges that the rules of this Court have been fully complied with.

WHEREFORE, for the reasons stated herein, it is respectfully submitted by petitioner that this case is one calling for the exercise by the Court of its discretionary powers, in order that the error herein pointed out may be corrected, and in order that justice may be done. And to such end, petitioner respectfully submits that a writ of certiorari should be granted and that this Court should review the decision of the United States Court of Appeals for the Fifth Circuit and finally should reverse it, and remand the case with instructions that the said Court of Appeals consider the argument advanced by petitioner, as raised by the pleadings, that is, that Mrs. Mary A. Smyth, et al., have no right of action to the 8000 acres claimed by them.

BOARD OF COMMISSIONERS OF
THE ATCHAFALAYA BASIN
LEVEE DISTRICT

By: _____

JOHN L. MADDEN
State Capitol
Baton Rouge, Louisiana

Of Counsel:

FERD C. CLAIBORNE
New Roads, Louisiana

CHARLES H. DAMERON
314 Louisiana National Bank Building
Baton Rouge, Louisiana

ASHTON L. STEWART
312 Louisiana National Bank Building
Baton Rouge, Louisiana